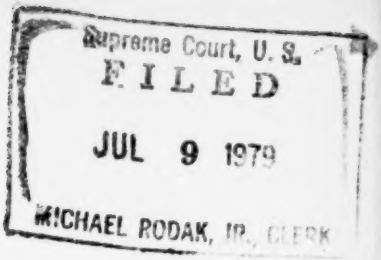

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1979

No. 79-35

IN THE MATTER OF JESSE B. HACKETT

PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA ~~SUPREME COURT~~ Ct App

William L. Daisy
James W. Miles, Jr.
Miles & Daisy
P. O. Box 899
Greensboro, North Carolina 27402
Telephone: (919) 379-9790

Counsel for Petitioners

July 9, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1979

No. ____

IN THE MATTER OF JESSE B. HACKETT

PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

John F. Hackett, Jr., Edna Hackett Lowe, and Gertrude Hackett Clayton pray that a writ of certiorari issue to review the decisions of the North Carolina Supreme Court and the North Carolina Court of Appeals in the above-entitled cause, the last of which was entered on April 9, 1979 (North Carolina Court of Appeals opinion infra, page A-1 and order of North Carolina Supreme Court denying discretionary review infra, page A-7).

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is unpublished and is included in the Appendix beginning at page A-1. The North Carolina Supreme Court denied a petition for discretionary review without opinion and this order is included in the Appendix beginning at page A-7.

JURISDICTION

The order of the North Carolina Supreme Court was entered on April 9, 1979. The jurisdiction of this Court rests on U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

QUESTIONS PRESENTED

1. Whether the termination of the Petitioners' cross-examination of the Respondent, prior to the inquiry into matters brought out on direct examination and prior to inquiry into the credibility and competency of the Respondent, constituted an abuse of discretion which violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether the denial of the Petitioners' right to a final argument to the jury constituted a prejudicial error which violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. The relevant portion of the Fourteenth Amendment to the United States Constitution provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law."

2. Fed. R. Civ. P. 43(b) provides:

> "Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions."

3. Fed. Rules of Evidence, Rule 611(b) provides:

"Scope of Cross-Examination should be limited to the subject matter of direct examination and matters affecting the credibility of the witness. The Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

4. N. C. Gen. Stat. Section 84-14 provides, in pertinent part, as follows:

"Court's control of argument - In all trials in the superior courts there shall be allowed two addresses to the jury for the state or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number."

5. N. C. Gen. Stat. Section 29-15 provides pertinent part, as follows:

"Shares of others than surviving spouse - Those persons surviving the intestate, other than the surviving spouse, shall take that share of the net estate not

distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, as follows:

(2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G.S. 29-16;"

6. N. C. Gen. Stat. Section 29-16 provides in pertinent part, as follows:

"Distribution among classes - (a) Children and their lineal descendants - If the intestate is survived by lineal descendants, their respective shares in the property which they are entitled to take under G.S. 29-15 of this chapter shall be determined in the following manner:

(1) Children - To determine the share of each surviving child, divide the property by the number of surviving children plus the number of deceased children who have left lineal descendants surviving the intestate."

STATEMENT OF THE CASE

The Petitioners, John F. Hackett, Jr., Edna Hacket, Lowe, and Gertrude Hackett Clayton, filed an action in the North Carolina General Court of Justice, Superior Court Division, Guilford County, North Carolina, on April 8, 1977, wherein they alleged, by verified petition, that the Respondent, Jesse B. Hackett, was incompetent from want of understanding and ability to manage her own affairs and property by reason of age and illness. The Petitioners further alleged in their petition that the Respondent is their mother and that she had a substantial amount of assets and income. On May 25, 1977, this matter came on before the Clerk of Superior Court of Guilford County, North Carolina, for a trial by jury at which the Petitioners were present and represented by counsel. At this proceeding,

the jury determined that the Respondent was mentally capable of managing her affairs, and judgment was entered to that effect on May 26, 1977. From this judgment, the Petitioners appealed to Superior Court for a jury trial de novo.

On June 23, 1977, prior to the trial de novo in Superior Court, counsel for the Petitioners moved to withdraw as their attorney of record, and on August 29, 1977, an order was entered permitting such withdrawal. On September 1, 1977, an order was entered permitting the Petitioners to appeal pro se and peremptorily setting the case for trial on October 17, 1977.

At trial, the Petitioners put on evidence tending to establish the Respondent's mental incapacity. This evidence consisted of the Petitioners testimony concerning the Respondent's actions and behavior and the testimony of one other witness on the same subject. At the close of the Petitioners' evidence, the Respondent moved for a directed verdict which was denied. The Respondent put on evidence in the form of testimony of seven witnesses including herself, and at the close of all of the evidence again renewed her motion for a

directed verdict which was denied. The jury answered the issue in favor of the Respondent and judgment was entered thereon on October 20, 1977.

From this judgment, the Petitioners appealed to the North Carolina Court of Appeals assigning as error the trial court's premature termination of the Petitioners' cross-examination of the Respondent and the denial by the trial court of the Petitioners' right to have a final argument to the jury. The North Carolina Court of Appeals held, in its opinion filed January 2, 1979, that the trial court had committed no error. On January 17, 1979, the Petitioners filed a Petition for Discretionary Review in the North Carolina Supreme Court pursuant to the provisions of North Carolina General Statute Section 7A-31 and North Carolina Rules of Appellate Procedure, Rule 10. This petition was denied by order of the North Carolina Supreme Court dated April 9, 1979.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONERS HAD THE RIGHT TO A FAIR AND FULL CROSS-EXAMINATION OF THE RESPONDENT AND THE UNTIMELY TERMINATION THEREOF CONSTITUTED ERROR, ABUSE OF DISCRETION AND THE DENIAL OF DUE PROCESS OF LAW.

It is settled law in North Carolina that although a trial court may control much of the scope and substance of cross-examination it can not deny the right of cross-examination to a litigant. Templeton v. State Highway Commission, 254 N.C. 337, 118 S.E.2d 918 (1961); Barnes v. North Carolina State Highway Commission, 250 N.C. 378, 109 S.E.2d 219 (1959); In Re Gibbons, 245 N.C. 24, 95 S.E.2d 85 (1956); In Re Gamble, 244 N.C. 149, 93 S.E.2d 66 (1956); State v. Hart, 239 N.C. 709, 80 S.E.2d 901 (1954).

This rule is well stated by Justice Varner, in his opinion in the case of Milling Co. v. North Carolina State Highway Commission, 190 N.C. 692, 130 S.E. 724, as follows:

> "The right to have an opportunity to a fair and full cross-examination of a witness upon every phase of his examination in chief, is an absolute right and not a mere privilege." Milling Co. v. North Carolina State Highway Commission, supra at 696.

The sole issue in the case sub judicie was the mental capacity of the Respondent to manage her affairs, however, after testifying at length regarding the Petitioners' behavior toward her, her job, her property, her financial dealings, her treatment by a psychiatrist and her twenty-one day stay at a state mental facility, the Respondent's cross-examination by one of the Petitioners was terminated after only six questions regarding one land transaction. It is quite apparent from the record that the Petitioners were only given the opportunity to cross-examine the Respondent on one aspect of her testimony-in-chief before their cross-examination was terminated. The Petitioners were not permitted to inquire into the Respondent's history of psycological treatment and hospitalization, nor were they permitted to cross-examine on the

subjects of her employment, the subject matter and value of her assets or other matters brought out on direct examination. Of equal importance, the jury was not given the opportunity to judge the Respondent's mental capacity under adverse questioning, which was the sole issue in controversy. Their own observation of the Respondent was during her direct examination, and an extremely brief cross-examination, which obviously showed the Respondent in the best possible light.

The Petitioners submit that the termination of the cross-examination of the Respondent after only six questions on one aspect of her direct testimony, did not grant a full and fair opportunity to cross-examine the party whose mental capacity was the only issue, constituted reversable error and abuse of discretion. The result of such error and abuse of discretion is that the Petitioners have been denied due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The Federal rule regarding the scope of cross-examination is practically identical to that of North Carolina's, providing generally that a full cross-

examination of a witness upon subjects of his examination-in-chief is the absolute right, not the mere privilege of the party against whom he is called, and the denial of such right is prejudicial and fatal error. Fed. Rules of Evidence, Rule 611(b), Calhoun v. Cook, 487 F2d 680, (Fifth Cir. 1973), Stay denied, 93 S.Ct. 302 34L. Ed 2d 237, U.S. v. Segal, 534 F2d 578 (Third Cir. 1976); Hagans v.Ellerman Bucknall Steamship Company, 318 F2d 563 (Third Cir. 1963). Further, the Federal rule recognizes a broader scope of cross-examination when a party elects to make himself a witness than would ordinarily be the case. Rivers v. Union Carbide Corporation, 426 F2d 633 (Third Cir. 1970); Mason v. Mathaisen Tanker Industries, Inc., 298 F2d 28 (Fifth Cir. 1962), cert. denied, 371 U.S. 828, 835 S.Ct. 23, 9 L.Ed. 2d 66.

The Petitioners submit that the erroneous limitation of their cross-examination of the Respondent has deprived them of due process of law in violation of the Fourteenth Amendment to the United States Constitution. First it is submitted that the failure of the trial court to follow the law requiring a full and fair cross-examination, in itself denied the Petitioners

their rights to due process of law under the United States Constitution. Field v. Boyle, 503 F.2d 774 (Seventh Cir. 1974); Calhoun v. Cook, supra; Robinson v. Wichita Falls and North Texas Community Action Corporation, 507 F.2d 245 (Fifth Cir. 1975), Sands v. Wainwright, 357 F.Supp. 1062 (M.D. Fla. 1973). The Petitioners argue further that they had a significant property interest in the outcome of the proceeding in question since, as children of the Respondent, they stood to inherit their rightful share of her assets at her death pursuant to N. C. Gen. Stat. Section 29-15 and 29-16. Therefore, the erroneous termination of the cross-examination deprived the Petitioners of a property right without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Clearly, this was a most difficult trial for the presiding judge. It was necessary for the judge to repeatedly inject himself into the proceeding due to the Petitioners' lack of knowledge of procedure and the rules of evidence. After all of the other witnesses had been heard, the Respondent was allowed to leave the

witness stand after only six questions. A little more patience at this point in the proceeding would have seen this matter to its just conclusion.

II.

THE PETITIONERS HAD THE RIGHT TO HAVE A FINAL ARGUMENT TO THE JURY AND THE DENIAL OF THIS RIGHT BY THE TRIAL COURT CONSTITUTED ERROR AND THE DENIAL OF DUE PROCESS OF LAW.

In addition to being denied the right to cross-examine the Respondent, the Petitioners were denied the right to a final argument to the jury. As set forth in the record, the Respondent waived her right to a jury argument, but the Petitioners made no such waiver. In fact, the Petitioners made a special request for their jury argument, which was denied by the trial court.

N. C. Gen. Stat. Section 84-14 provides in pertinent part, as follows:

> "In all trials in the Superior Courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number."

It is settled law in North Carolina that a trial judge has a large discretion in controlling and directing the argument to the jury, however this discretion does not include the denial of the jury argument entirely. Puett v. Railroad, 114 N.C. 332, 53 S.E. 852 (1906); Irvin v. Southern Railway, 164 N.C. 5, 80 S.E. 78 (1913); In Re Will of Farr, 7 N.C. App. 250, 172 S.E. 2d 78 (1970); Kennedy v. Tarlton, 12 N.C. App. 397, 183 S.E.2d 276 (1971).

Although it is generally contemplated that the final jury argument should be made by a party's counsel, certainly this presumption should not be used to deny this right to a litigant appearing pro se. Should his argument proceed improperly or should such litigant ignore instructions and rulings from the bench, then the Court has the authority

to limit his argument and cure any misstatements in its instructions to the jury. Here, the Petitioners were not given the first opportunity to make any jury argument, which they submit, in itself, constitutes reversible error and a denial of due process of law as provided by the Fourteenth Amendment to the United States Constitution. Field v. Boyle, supra, Calhoun v. Cook, supra, Robinson v. Wichita Falls and North Texas Community Action Corporation, supra, Sands v. Wainwright, supra. The Petitioners further submit that the denial of their statutory right to have a final argument to the jury deprived them of a property interest under N. C. Gen. Stat. Section 29-15 and 29-16 since the Petitioners are the children of the Respondent and stand to inherit property from the Respondent at her death, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

It is submitted that the untimely termination of cross-examination and the denial of a final jury argument deprived the Petitioners of the right to have this case determined in accordance with the

requirements of North Carolina law. As a result of these errors by the trial court, the Petitioners were denied due process of law as required by the Fourteenth Amendment to the United States Constitution.

It is further submitted that the balancing of the essential elements of procedural due process with the necessity that trial courts control trial proceedings where litigants appear pro se, is of sufficient significance to require a decision by this Court.

For these and other reasons stated, this petition for a writ of certiorari should be granted.

Respectfully sutmitted,

William L. Daisy

James W. Miles, Jr.

OF COUNSEL:
Miles & Daisy
P. O. Box 899
Greensboro, N. C. 27402
Telephone: (919) 379-9790

APPENDIX

No. 7819SC322

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 1979

IN THE MATTER OF
JESSIE B. HACKETT

Guilford County
No. 77SP551

Appeal by petitioners from Walker, Judge. Judgment entered 20 October 1977 in Superior Court, Guilford County. Heard in the Court of Appeals in Winston-Salem on 6 December 1978.

On 8 April 1977, petitioners, J. F. Hackett, Jr., Edna Hackett Lowe, and Gertrude Hackett Clayton, brought this action to declare their mother, Jessie B. Hackett, incompetent and to appoint a guardian of her property and affairs.

At the hearing before the Clerk of Superior Court, the jury found the respondent was not mentally disordered or incompetent.

Petitioners appealed to the Superior Court for a trial de novo. The

petitioners appeared pro se at the Superior Court trial. During the presentation of petitioners' case, the trial court continually admonished J. F. Hackett, Jr. for asking irrelevant and prejudicial questions, and for asking witnesses to repeat hearsay. He was also admonished for interrupting during the cross-examination of his sisters by respondent's counsel. The judge threatened to remove him from the stand when he was testifying because he insisted upon discussing irrelevant matters.

Respondent presented testimony of six witnesses to show that respondent was competent to manage her affairs. During the cross-examination of respondent's witnesses, J. F. Hackett, Jr. repeatedly argued with the witnesses. During cross-examination of respondent's witnesses he insisted on "testifying" rather than simply asking questions.

During cross-examination of the respondent, J. F. Hackett, Jr. argued with her and constantly interrupted her. Twice the judge instructed him to refrain from arguing with the respondent. On the third occasion, the judge ordered Mrs. Hackett

to step aside and refused to let J. F. Hackett, Jr. complete his cross-examination.

Respondent's counsel then stated that since the petitioners had not offered to argue to the jury, that respondent would also waive jury argument.

The petitioners did not object to the trial court's ruling that no jury argument would take place. The court then charged the jury. At that time, the petitioner, J. F. Hackett, Jr., requested that the court permit him to argue to the jury. The court denied the petitioner's request and submitted the case to the jury.

The jury found that the respondent, Jessie B. Hackett, was not mentally disordered or incompetent.

Miles & Daisy by James W. Miles, Jr. for petitioners appellants.

Robert S. Cahoon for respondent appellee.

CLARK, Judge.

Petitioners first contend that the court committed prejudicial error and abused its discretion by terminating petitioner J. F. Hackett, Jr.'s cross-examination of the respondent.

It is well-settled that a litigant has "(t)he right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination-in-chief . . ." Milling Co. v. Highway Commission, 190 N.C. 692, 696, 130 S.E. 724, 726 (1925).

The trial jduge, however, "is responsible for the orderly conduct of a trial. It is his duty to protect a witness from repetitious questions and he may even order a witness to stand aside if counsel disregards repeated warnings to refrain from repetitious and irrelevant questions." State v. Cox, 6 N.C. App. 18, 23, 169 S.E. 2d 134, 137 (1969). In McPhail v. Johnson, 115 N.C. 298, 20 S.E. 373 (1894), the court upheld the power of a trial judge to remove a witness from the stand and to prevent further cross-examination after the court had "frequently notified defendant's counsel that the examination should be conducted in a legal and proper manner . . ." 115 N.C. at 301.

The case sub judice, the trial judge made every effort to aid the petitioner in his examination of witnesses, J. F. Hackett, Jr., however, refused to comply with the judge's instructions and constantly interrupted witnesses, inserted his own answers to questions presented to other witnesses, and harassed witnesses with irrelevant and demeaning questions.

The trial judge, after his repeated warnings to the petitioner, J. F. Hacket, Jr., were ignored, did not abuse his discretion in standing the witness aside.

Petitioners also contend that the court erred in refusing to permit the petitioners to argue to the jury.

The petitioners, however, failed to object to the trial court's ruling until after the jury had been charged. It is generally held that a failure to object to the court's denial of jury argument constitutes a waiver of the right to jury argument. See, Annot., 38 A.L.R. 2d 1396, Section 5(b), (e) and 6(c) (1954). We find no merit in petitioners' second assignment or error.

No error.

Judges MITCHELL and WEBB concur.

Report per Rule 30(e).

No. 3PC EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1979

IN THE MATTER OF JESSIE B. HACKETT

ORDER DENYING PETITION
FOR DISCRETIONARY REVIEW

(7818SC322)

This cause came on to be considered upon the petition of John F. Hackett, Jr., Edna Hackett Lowe and Gertrude Hackett Clayton for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference, this 4th day of April, 1979, that the petition be denied and that it be so certified to the North Carolina Court of Appeals.

s/ Brock J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 9th day of April, 1979.

s/ John R. Morgan
John R. Morgan
Clerk of the Supreme
Court of North Carolina